82-618

Office - Supreme Court, U.S.
FILED
SEP 21 1982
ALEXANDER L. STEVAS,
CLERK

No.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

JOSEPH A. KOSAK, PETITIONER

v.

UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Jeffrey L. Naftulin
Naftulin and Silver
90 North Main Street
Doylestown, PA 18901
(215) 348-5455
Attorney for Petitioner

QUESTIONS PRESENTED

1. Whether the provision of the Federal Tort Claims Act (FTCA) that bars claims "arising in respect of. . .the detention of any goods or merchandise by any officer of customs. . .," 28 U.S.C. §2680(c), precludes a claim against the United States for negligent and careless damage to property while in the custody of the Customs Service.

2. Whether the district court judge erred in dismissing the Petitioner's Complaint.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statutory provisions involved	1
Statement	2
Reasons for granting the petition	4
Conclusion	11
Appendix A	11a
Appendix B	12a
Appendix C	13a
Appendix D	14a

TABLE OF AUTHORITIES

Cases:

A & D International, Inc. v. United States, 665 F.2d 669 (5th Cir. 1982)	4
A-Mark, Inc. v. United States Secret Service, 593 F.2d 849 (9th Cir. 1978)	4,7,8
Alliance Assurance Co. v. United States, 252 F.2d 529 (2d Cir. 1958)	4,7,8
Conley v. Gibson, 355 U.S. 41, 2L.Ed. 2d 80, 78 S.Ct. 99, at 355 U.S. 45-46 (1957)	10
Griffen v. Locke, 286 F.2d 514 (9th Cir. 1961)	9
Hatzlachh Supply Co. v. United States, 444 U.S. 460, 462 n.3. (1980)	5,6
Kosak v. United States, 679 F. 2d 306, 308 (3rd Cir. 1982)	7,9
United States v. One (1) Douglas A-26B Aircraft, 662 F.2d 1372 (11th Cir. 1981)	5
United States v. One (1) 1972 Wood, 19 Foot Custom Boat, FL 8443AY, 501 F.2d 1327 (5th Cir. 1974)	5

Statutes:
28 U.S.C. Section 2680(b) 8
28 U.S.C. Section 2680(c) 4,6,7

Miscellaneous:
S.Rep. No. 1400, 79th Cong. 2d
Sess. 33 (1946) 7

OPINIONS BELOW

The opinion of the court of appeals (App. A, infra, 1a-11a is reported at 679F.2d 306 (1982). There is no opinion by the district court. A copy of the district court order is attached (App. D, infra, 14a.)

JURISDICTION

The judgment of the court of appeals (App. B, infra, 12a.) was entered on May 19, 1982. A petition for rehearing was denied on June 24, 1982 (App. C, infra, 13a) The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Federal Tort Claims Act, Act of June 25, 1948, 62 Stat. 982 (28 U.S.C. §§1346(b), 2671 et seq.).

28 U.S.C. §1346(b) -

> The district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, . . ., for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. §2680(c) -

> The provisions of this chapter (Tort Claims Procedure) and section 1346(b) of this title shall not apply to --
> . . . .
> (c) Any claim arising in respect of . . . the detention of any goods or merchandise by any officer of customs. . . .

STATEMENT

On February 28, 1978, the Customs Service Agents acting with a search warrant, seized certain antiques, objects of art, and personal papers from the home of Appellant. Appellant was subsequently charged with

smuggling goods into the United States in violation of 18 U.S.C. §545, but was found not guilty on May 8, 1978 by a jury. (Appellant was in the navy stationed in Guam. He was transferred to the Philadelphia Naval Base and shipped home his oriental art collection. He was accused of falsifying a customs statement by listing his art collection as his own personal property rather than listing it for resale in the United States.)

On September 29, 1978, the Customs Service forwarded a "Notice of Penalty" to the Appellant informing him that his art collection was being forfeited. After Appellant filed a Petition to have his collection returned, the Customs Service returned the artifacts on June 1, 1979 in damaged condition.

After the Customs Service rejected Appellants claim for damages, suit was filed against the United States in District

Court seeking $12,300. in damages. The Appellee filed a Motion to Dismiss the Complaint which was granted by the District Court. The United States Court of Appeals for the Third Circuit affirmed in a three judge panel decision with one dissent.

REASONS FOR GRANTING THE PETITION

Various federal courts of appeals have been confronted with the issue of whether the FTCA provision which bars claims "arising in respect of . . . the detention of any goods or merchandise by any officer of customs. . .," 28 U.S.C. §2680(c), precludes a claim against the United States for negligent damage to property while in the custody of the Customs Service. These various courts have reached conflicting decisions on this issue. See Alliance Assurance Co. vs. United States, 252 F.2d 529 (2d Cir. 1958); A-Mark, Inc. v. United States Secret Service, 593 F.2d 849 (9th Cir. 1978); A & D International, Inc. v.

United States, 665 F.2d 669 (5th Cir. 1982); United States v. One (1) 1972 Wood, 19 Foot Custom Boat, FL 8443AY, 501 F.2d 1327 (5th Cir. 1974); United States v. One (1) Douglas A-26B Aircraft, 662 F.2d 1372 (11th Cir. 1981). The Supreme Court recognized this conflict in Hatzlachh Supply Co. v. United States, 444 U.S. 460, 462 n.3. (1980).

In the case at bar, the customs agents acted in a reprehensible manner. They posed as merchants from Abraham Weiner & Sons of Camden, New Jersey and tried to talk the Appellant into selling his art collection (which Appellant never did). When the government lost the case, they eventually returned Appellant's art collection. Some of the items were returned in a paper bag broken, cracked and damaged. There was great animosity between the customs agents and the Appellant throughout the case. If Appellant has no recourse for the damages he sustained, then there is nothing to prevent the Customs Service from smashing

or destroying any items it seizes as evidence before returning it to its rightful owner.

The Supreme Court in Hatzlachh Supply Co. v. United States, supra. discussed the legislative intent behind the exemption of §2680(c). The Court pointed out that an exemption was made in regard to the detention of goods by customs officers because "other laws provided the machinery for recovery on these claims", 444 U.S. 460, 463 n.4. In this case, there is no other machinery to recover (If there is another way for the Appellant to recover, he should be permitted to do so. The district court judge refused to consider this and this issue is addressed in this petition).

Furthermore, the third circuit in the case at bar also discussed the legislative intent. The court pointed out that "the group of exceptions that includes the exception for claims arising out of the detention of goods by customs officers covers 'claims which relate to certain

governmental activities which should be free from the threat of damage suit, or for which adequate remedies are already available. S. Rep. No. 1400, 79th Cong. 2d Sess. 33 (1946),'" Kosak v. United States, 679 F.2d 306, 308 (3rd Cir. 1982). There is no adequate other remedy and this is not the type of activity which should be free from the threat of a damage suit. Congress never meant to give the Customs Service a license to destroy property.

In the instant case, it was not the detention of these collectibles, but their careless and destructive mishandling by customs officials which caused the breakage and loss. The ninth circuit in A-Mark, Inc. v. United States Secret Service, supra. and Alliance Assurance Co. v. United States, supra. reasoned that the exemption of §2680(c) does not cover negligent handling of the goods but only bars damages for claims caused by the detention itself.

It is sensible to view §2680(c) as did the

court in Alliance and A-Mark. The exception provides an umbrella protection so that customs officials may inspect goods carefully and slowly, free from claims that their prolonged or illegal detentions have caused losses to Plaintiffs. The exception is not, however, a carte blanche to carelessness.

The Alliance court, supra., also pointed out one other important factor. §2680(b) expressly bars actions against the postal service for negligent transmission of postal matter. This court then went on to state:

> "If Congress had similarly wished to bar actions based on the negligent loss of goods which governmental agencies other than the postal system undertook to handle, the exception in 28 U.S.C.A. §2680(b) shows that it would have been equal to the task. The conclusion is inescapable that it did not choose to bestow upon all such agencies general absolution from carelessness in handling property belonging to others." 252 F.2d 529, 534.

As was pointed out in the dissent in the case at bar, the Court should look at the logic and language of the exception. As was stated by Judge Weis,

"By its terms, it excludes any claim 'arising in respect of . . . the detention of any goods. . . .' Webster's Third International New Dictionary 1934 (1968) defines 'in respect of: to mean 'as to: as regards: insofar as concerns: with respect to.' These definitions indicate that the statutory exception is directed to the fact of detention itself, and that alone. The language is not broad enough to exempt a claim for damage occurring 'during' detention." 679 F.2d 306, 310.

The appellant had the right to have his property returned to him in undamaged condition. He should be compensated by the United States for the damage that was done.

The Appellant also asserts that the district judge erred in dismissing the Complaint. It should be noted that the district judge never gave a reason for the dismissal.

The ninth circuit addressed a similar situation in Griffen v. Locke, 286 F.2d 514 (9th Cir. 1961) wherein a district court judge dismissed a complaint without advising the parties of the basis for the dismissal. The court set aside the judgment of dismissal and remanded the cause to the district court with directions to the lower court to

advise the Appellant of the ground or grounds for dismissal and to permit the Appellant time to amend the complaint.

Appellant attempted to contact the district court judge to find out a reason for the dismissal and to allow the Appellant to amend his complaint. The district court refused to give a reason for its decision. As was stated earlier, if there is a remedy for Appellant, he should be permitted to pursue that remedy. Appellant should also be permitted to amend his complaint if he can state a cause of action by doing so.

Lastly, the federal courts are uniform in their position that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the Plaintiff can prove no set of facts in support of his claim which would entitle him to relief. Conley v. Gibson, 355 U.S. 41, 2L.Ed. 2d 80, 78 S.Ct. 99, at 355 U.S. 45-46 (1957).

One of the items destroyed by Customs was

broken while the search warrant was being executed. It was not one of the items detained by Customs and thus the exemption does not apply. Also, damages were alleged for failure to return a stereo receipt which was seized with Appellant's personal papers. The exemption states that it is only for damage to goods and merchandise and thus it doesn't apply to damages caused by failure to return the receipt. Thus, even if the exemption barred most of Appellant's law suit, he still could prove a set of facts to recover for one of the items that was destroyed and for his damages in not getting back the receipt. Appellant should be permitted to pursue these claims.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

Jeffrey L. Naftulin

September 1982

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 81-2855

KOSAK, Joseph A.,

Appellant

v.

UNITED STATES OF AMERICA

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA
(D.C. Civil No. 81-02054)

Submitted Under Third Circuit Rule 12(6)
April 27, 1982
Before: ALDISERT, WEIS, and BECKER, *Circuit Judges*
(Filed May 19, 1982)

Charles S. Silver, Esquire
Jeffrey L. Naftulin & Associates
90 North Main Street
Doylestown, Pennsylvania 18901
Counsel for Appellant

Peter F. Vaira, Esquire
United States Attorney
Walter S. Batty, Jr., Esquire
Assistant U.S. Attorney
Serena H. Dobson, Esquire
Assistant U.S. Attorney
3310 U.S. Courthouse
601 Market Street
Philadelphia, Pennsylvania 19106

Allan L. Martin, Esquire
U.S. Customs Service
40 South Gay Street
Baltimore, Maryland 21201
Counsel for Appellee

OPINION OF THE COURT

ALDISERT, *Circuit Judge*.

The question presented by this appeal is whether the provision of the Federal Tort Claims Act (FTCA) that bars claims "arising in respect of . . . the detention of any goods or merchandise by any officer of customs . . .," 28 U.S.C. §2680(c), precludes a claim against the United States for negligent damage to property while in the legitimate custody of the Customs Service. We conclude that it does and therefore affirm the judgment of the district court that dismissed appellant's complaint.

I.

On February 28, 1978, Customs Service agents seized certain antiques and objects of art from the home of Joseph Kosak. He was subsequently charged with smuggling goods into the United States in violation of 18 U.S.C. §545, but was found not guilty. The Customs Service returned the detained property to him but Kosak

contended that certain items had been damaged as a result of Customs Service negligence during the detention. Alleging jurisdiction under 28 U.S.C. §1346(b),[1] he brought this FTCA action in district court seeking $12,310 in damages. The Government responded that Kosak's claim was barred because it fell under 28 U.S.C. §2680(c). The district court dismissed the complaint.[2]

Section 2680 enumerates several exceptions to the FTCA's general relaxation of tort immunity. Section 2680(c) specifies:

> The provisions of this chapter [Tort Claims Procedure] and section 1346(b) of this title shall not apply to —
>
> . . . .
>
> (c) Any claim arising in respect of . . . the detention of any goods or merchandise by any officer of customs. . . .

Finding no decision of this court interpreting this section of the FTCA, appellant invites us to adopt the interpretation of the Second Circuit, as announced in *Alli-*

---

1. 28 U.S.C. §1346(b), the jurisdictional section of the Federal Tort Claims Act, states:

> [T]he district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, . . . for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

2. The district court did not specify the actual ground for dismissal — whether lack of subject matter jurisdiction, Fed. R. Civ. P. 12(b)(1), or failure to state a claim upon which relief can be granted, Fed. R. Civ. P. 12(b)(6). Of itself this ambiguity will not cause us to set aside the district court's order. In light of the bar created by §2680(c), no set of facts will support the plaintiff's claim. *See Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

ance Assurance Co. v. United States, 252 F.2d 529 (2d Cir. 1958), which held that §2680(c) applies only to claims based on injury caused by detention itself and not to losses caused by the Customs Service's negligent handling of goods during detention.

II.

The courts are divided in their interpretations of this section.[3] The divergence stems from the phrase "arising from the detention of goods. . . ." The *Alliance* court speculated that the

---

3. The Supreme Court was presented with an argument similar to Kosak's in *Hatzlachh Supply Co. v. United States*, 444 U.S. 460 (1980) (per curiam). Although the Court summarized the conflicting interpretations of §2680(c), it expressly declined to resolve the conflict. *Id.* at 462 n.3.

A-Mark, Inc. v. United States Secret Service, 593 F.2d 849, 850 (9th Cir. 1978) (per curiam), is in accord with *Alliance* in that §2680(c) "reaches only those claims asserting injury as a result of the fact of detention itself where the propriety of the detention is at issue, and does not reach claims where the injury is asserted to result from negligent handling of property in the course of detention." *See also A & D International, Inc. v. United States*, 665 F.2d 669 (5th Cir. 1982) (accepting the *Alliance* distinction between losses and wrongful detention).

In contrast, the court in *United States v. One (1) 1972 Wood, 19 Foot Custom Boat, FL 8443AY*, 501 F.2d 1327, 1330 (5th Cir. 1974) (per curiam), observing that "28 U.S.C. §2680 specifically prohibits the bringing of any claim arising from the detention of any goods or merchandise by a customs officer," affirmed the denial of a counterclaim for damage to a boat and the loss of its service. The Supreme Court in *Hatzlachh* appropriately identified this Fifth Circuit decision as one in conflict with *Alliance*. 444 U.S. at 462 n.3. Nevertheless, the court in *A & D International* took issue with the Supreme Court's categorization, and declared that because the earlier decision dealt with a challenge to the propriety of the Custom Service's storage charges, it involved only detention of property. 665 F.2d at 672-73 & n.2. This explanation appears to us to be based upon a misreading of the earlier decision, for it is clear that the own-

> probable purpose of the exception was to prohibit actions for conversion arising from a denial by the customs authorities . . . of another's immediate right of dominion or control over goods in the possession of the authorities. . . . [and not] to bar actions based on the negligent destruction, injury or loss of goods in the possession or control of the customs authorities. . . .

252 F.2d at 534. Comparing 28 U.S.C. §2680(b)'s explicit preclusion of actions against the postal system "arising out of the loss, miscarriage, or negligent transmission" of mail, the *Alliance* court reasoned that if Congress had intended to bar actions claiming negligence of the customs officials, it would have done so in like manner. We disagree.

Alliance's rationale ignores the clear language of §2680(c), the legislative intent, and specific teachings of the Supreme Court regarding interpretation of exceptions to the FTCA. Statutory interpretation begins with the language of the statute itself.

> As in all cases involving statutory construction, "our starting point must be the language employed by Congress," *Reiter v. Sonotone Corp.*, 442 U.S. 330, 337 (1979), and we assume "that the legislative purpose is expressed by the ordinary meaning of the words used." *Richards v. United States*, 369 U.S. 1, 9 (1962). Thus "[a]bsent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *Con-*

---

er of the boat counterclaimed for damage to his property while it was in storage.

See also S. Schonfeld Co. v. SS Akra Tenaron, 363 F.Supp. 1220, 1223 (D.S.C. 1973) ("There is nothing in the language of the statute to indicate that erroneous seizure in the inception should be distinguished from improper retention or negligent handling of goods properly seized at the outset.").

sumer Product Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980).

American Tobacco Co. v. Patterson, U.S. (50 U.S.L.W. 4364, 4365-66, April 5, 1982).[4] In our view, the language of the statute covers all claims arising out of detention of goods by customs officers and does not purport to distinguish among types of harm.

Moreover, the legislative history of §2680(c) reveals no "clearly expressed legislative intention" contrary to the ordinary meaning of the section's language. The section-by-section analysis contained in the committee report on the bill provides only a brief statement that the group of exceptions that includes the exception for claims arising out of the detention of goods by customs officers covers "claims which relate to certain governmental activities which should be free from the threat of damage suit, or for which adequate remedies are already available." S. Rep. No. 1400, 79th Cong. 2d Sess. 33 (1946). There is nothing in the legislative history to show that this exemption was to be restricted to claims in conversion.

Our examination of the purposes of the statutory schema reinforces our view. In *Dalehite v. United States*, 346 U.S. 15 (1953), the Court makes clear that sovereign immunity is the rule, and that legislative departures from the rule must be strictly construed. The Court observed that the FTCA was an example of the

---

4. The court's function in interpretation of statutes is also defined in *Rubin v. United States*, 449 U.S. 424, 430 (1981):

> When we find the terms of a statute unambiguous, judicial inquiry is complete, except "in 'rare and exceptional circumstances.' " *TVA v. Hill*, 437 U.S. 153, 187, n.33 (1978) (quoting *Crooks v. Harrelson*, 282 U.S. 55, 60 (1930)). Accord, *Aaron v. SEC*, 446 U.S. 680, 695 (1980); *Ernst & Ernst v. Hochfelder*, [425 U.S. 185, 214 n.33]. No such circumstances are present here, for our reading of the statute is wholly consistent with the history and the purposes of the Securities Act of 1933.

step-by-step legislative relaxation of sovereign immunity and teaches that in interpreting these statutory modifications and their exceptions,

> courts include only those circumstances which are within the words and reason of the exception. They cannot do less since petitioners obtain their "right to sue from Congress [and they] necessarily must take [that right] subject to such restrictions as have been imposed." *Federal Housing Administration v. Burr*, 309 U.S. 242, 251.
>
> So, our decisions have interpreted the Act to require clear relinquishment of sovereign immunity to give jurisdiction for tort actions.

346 U.S. at 31 (footnotes omitted). Exceptions to the government's relaxation of immunity "are not to be nullified through judicial interpretation, since Congress clearly delineated the areas in which it did not intend to forfeit its immunity from suit." *Builders Corp. of America v. United States*, 320 F.2d 425, 426 (9th Cir. 1963), *cert. denied*, 376 U.S. 906 (1964).

Reading §2680(c) in this light, we find no "clear relinquishment of sovereign immunity."

> In cases of statutory construction, this Court's authority is limited. If the statutory language and legislative intent are plain, the judicial inquiry is at an end. Under our jurisprudence, it is presumed that ill-considered or unwise legislation will be corrected through the democratic process; a court is not permitted to distort a statute's meaning in order to make it conform with the Justices' own views of sound social policy. See *TVA v. Hill*, 437 U.S. 153 (1978).

Industrial Union Department v. American Petroleum Institute, 448 U.S. 607, 688 (1980) (Marshall, J., dissenting). Appellant's claim arises from detention of

goods by a customs officer, and therefore, whether it arises in negligence or in conversion, it is barred by §2680(c).

III.

The judgment of the district court will be affirmed.

WEIS, dissenting.

The interpretation of §2680(c) adopted by the majority in this case produces anomalous results. If a traveller handed an expensive oriental vase to a customs officer for inspection at a port of entry, and the officer carelessly dropped the vase, damages would be payable under the Federal Tort Claims Act. Under the court's holding today, however, that same individual would be without an FTCA remedy if the officer dropped the vase during a period of detention. I do not believe that the statutory language shows that Congress intended to bring about such inconsistent results by giving the Customs Service a license to harm property while it is being detained. Plaintiff had as much right to expect that the government would return his possessions intact, or else respond in damages, as any other person who is forced to temporarily relinquish his property to the government.

The Federal Tort Claims Act, 28 U.S.C. §§2671 *et seq.*, was Congress' response to complaints that sovereign immunity worked an injustice on citizens who had suffered personal injury or property damage through the negligence of government employees. In general, the statute waives sovereign immunity so that the government is liable in circumstances where private persons would be responsible for damages in tort. 28 U.S.C. §2674. Even under the general rule that a waiver of sovereign immunity must be narrowly construed, the loss at

issue here is plainly the type that Congress intended the government to recompense.

If the provisions of the statute stopped at that point, there is no question that the plaintiff would be entitled to recover on proof that his property was carelessly damaged by customs employees. But after providing a waiver of sovereign immunity, the FTCA goes on to list a number of exceptions, much like an insurance policy which initially grants coverage in broad terms and then refines it by a series of exclusions.

The purpose of strictly construing the waiver of sovereign immunity is served once the outer limits of the government's liability are demarcated. Thereafter, the specific exceptions that Congress listed should not be interpreted expansively against the citizen to defeat the general waiver, but rather should be limited to their terms. As the Supreme Court said in *Dalehite v. United States*, 346 U.S. 15, 31 (1953):

> "Of course, these modifications are entitled to a construction that will accomplish their aim, that is, one that will carry out the legislative purpose of allowing suits against the Government for negligence with due regard for the statutory exceptions to that policy. In interpreting the exceptions to the generality of the grant, courts include only those circumstances which are within the words and reason of the exception."

It is important, therefore, to look to the language and logic of the exception in 28 U.S.C. §2680(c). By its terms, it excludes any claim "arising in respect of . . . the detention of any goods. . . ." Webster's Third International New Dictionary 1934 (1968) defines "in respect of" to mean "as to: as regards: insofar as concerns: with respect to." These definitions indicate that the statutory exception is directed to the fact of detention itself, and that alone. The language is not broad enough to exempt a claim for damage occurring "during" detention. In

reaching the contrary conclusion, the district court reviewing §2680(c) in *S. Schonfeld Co. v. SS Akra Tenaron*, 363 F.Supp. 1220, 1223 (D. S.C. 1973), said that "the statute specifically bars 'any claim' arising out of the detention of goods." As noted, however, the statutory language is "in respect of," not "arising out of" — a subtle but nevertheless significant distinction.

Further support for my interpretation of §2680(c) is provided by *Alliance Assurance Co. v. United States*, 252 F.2d 529 (2d Cir. 1958), in which the Second Circuit held that Congress did not intend the statutory exception to bar actions based on the negligent destruction, injury or loss of goods in the possession of the customs authorities. Observing that §2680(b) expressly bars actions "arising out of the loss, miscarriage, or negligent transmission" of mail, the court reasoned:

> "If Congress had similarly wished to bar actions based on the negligent loss of goods which governmental agencies other than the postal system undertook to handle, the exception in 28 U.S.C.A. §2680(b) shows that it would have been equal to the task. The conclusion is inescapable that it did not choose to bestow upon all such agencies general absolution from carelessness in handling property belonging to others."

Id. at 534. *In A-Mark, Inc. v. United States Secret Service*, 593 F.2d 849 (9th Cir. 1978), the Ninth Circuit also applied this reasoning to a factual situation similar to the one at hand, and held that §2680(c) did not bar recovery for damages to an article incurred during detention.

By contrast, neither of the appellate decisions that have denied recovery for damages analyzed the language or policy of §2680(c) before coming to their conclusion. *See United States v. One (1) Douglas A-26B Aircraft*, 662 F.2d 1372 (11th Cir. 1981); *United States v. One (1) 1972 Wood, 19 Foot Custom Boat*, 501 F.2d 1327 (5th Cir. 1974). It is also noteworthy that even

though *Hatzlachh Supply Co. v. United States*, 444 U.S. 460 (1980), did not resolve the conflict between the circuits, the Supreme Court did reverse the decision of the Court of Claims which had relied in part upon an expansive interpretation of §2680(c) that would bar recovery for damage to detained goods.

In summary, I am persuaded that the interpretation placed upon §2680(c) by the Second and Ninth Circuits is correct. The United States had a legal right to detain the plaintiff's property without liability for the damages which might be caused by the denial of possession. However, the government is not immune from liability for the harm it did to the property while it was being detained. I would reverse the judgment of the district court.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

United States Court of Appeals

FOR THE THIRD CIRCUIT

No. 81-2855

KOSAK, JOSEPH A.,
Appellant

vs.

UNITED STATES OF AMERICA

(D. C. Civil No. 81-02054)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: ALDISERT, WEIS and BECKER, Circuit Judges

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was ~~argued by counsel~~ submitted under Third Circuit Rule 12(6) on April 27, 1982.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, entered October 15, 1981, be, and the same is hereby affirmed. Costs taxed against appellant.

ATTEST:

Clerk

May 19, 1982

United States Court of Appeals

FOR THE THIRD CIRCUIT

No. 81-2855

KOSAK, Joseph A.,

Appellant

vs.

UNITED STATES OF AMERICA
(E.D. Pa. Civ. No. 81-02054)

SUR PETITION FOR REHEARING

Present: SEITZ, Chief Judge, and ALDISERT, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER and BECKER, Circuit Judges.

The petition for rehearing filed by

Appellant

in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

Judge Garth would grant the petition for rehearing.

By the Court,

Clerk

Dated: JUL 23 1982

SHD:tlr

(3)

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOSEPH A. KOSAK,

Plaintiff : FILED

FILED OCT 15 1981

v. OCT 15 1981 CIVIL ACTION NO. 81-2054

MICHAEL E. KUNZ, Clerk

UNITED STATES OF AMERICA, : Dep. Clerk

Defendant :

O R D E R

AND NOW, this 13Th day of OCTOBER, 1981, upon consideration of Defendant's Motion to Dismiss or in the Alternative for Summary Judgment and the memorandum in support thereof, it is hereby

ADJUDGED, ORDERED and DECREED

that such motion is granted and the Complaint is dismissed.

BY THE COURT:

J.

ENTERED: OCT 15 1981

CLERK OF COURT